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No. 99-604

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CARMEN VELAZQUEZ, *et al.*,

Petitioners,

—v.—

LEGAL SERVICES CORPORATION and UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF LEGAL SERVICES CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the restrictions imposed on the activities of Legal Service Corporation grantees contained in the 1996 and 1997 Omnibus Appropriations Acts and the Department of Commerce, Justice and State, The Judiciary and Related Agencies Appropriations Act, 1998 (with the exception of one such restriction), and the regulations implementing those restrictions, 45 C.F.R. Part 1610, did not violate the First Amendment of the United States Constitution.

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STATEMENT OF THE CASE

Contrary to Petitioners' characterization, there is nothing novel or confusing about the state of the law governing this case. On January 7, 1999, the United States Court of Appeals for the Second Circuit unanimously upheld all but one provision of the 1996 legislation imposing certain restrictions on the activities of Legal Services Corporation grantees against a facial constitutional challenge. In doing so, the court of appeals applied this Court's well established teachings in *Regan v. Taxation Without Representation*, 461 U.S. 540 (1983) (*"TWR"*), *FCC v. League of Women Voters*, 468 U.S. 364 (1984), and *Rust v. Sullivan*, 500 U.S. 173 (1990). The court's ruling was also consistent with that of the Ninth Circuit, which in a unanimous opinion written by former Justice Byron White, also rejected a constitutional challenge to the LSC statute. *Legal Aid Society of Hawaii v. Legal Services Corporation*, 145 F.3d 1017 (9th Cir.), *cert. denied*, 119 S. Ct. 539 (1998) ("*LASH III*").

In short, as we demonstrate more fully below, there is no conflict with either prior rulings of this Court or with decisions of other circuit courts with respect to the issues raised in this petition, and the petition should therefore be denied. In order to more fully understand why this is the case, the following background concerning the history of the Legal Services Program and this litigation is necessary.

A. The History And Purpose Of The LSC Program

Congress created the Legal Services Corporation ("LSC") in 1974 as an independent, non-profit corporation whose purpose was to provide basic legal services to the poor. Pub. L. No. 93-355, 88 Stat. 378 (1974) (codified as amended, 42 U.S.C. §§ 2996 et seq. (1994)) (the "LSC Act"). The history of the program makes certain things abundantly clear.

First, Congress intended that the program it created would operate as a subsidy program that would use both federal

money and funds from other sources to carry out its mission. Every year, LSC distributes funds appropriated by Congress to local grantee organizations. 42 U.S.C. §§ 2996b(a) and 2996e(a). However, virtually all LSC grantee programs are funded with a combination of LSC and non-LSC funds from public and/or private sources. JA 297 (¶ 4); JA 225 (¶ 14).[1]

Second, Congress viewed a primary purpose of the program as providing "traditional legal representation for the poor." H.R. Rep. No. 95-310 at 34 (1977) (views of Rep. McClory). As one Member of the House stated, lawyers in programs funded by LSC should be "preoccupied with day-to-day problems involving housing, domestic relations, consumer affairs and employment" and should not be "spending their time reforming laws they find discriminatory against the poor through class action and test-case litigation." 119 Cong. Rec. 20688 (1973) (Rep. Biester).[2] Thus, Congress intended the program to emphasize individual cases in areas such as consumer and family law, and housing.[3] The primary focus continues to be on "bread-and-butter services." 142 Cong. Rec. H8189 (July 23, 1996) (Rep. Torkildsen).

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[1] Citations to "JA" are to the Joint Appendix submitted in connection with the appeal below

[2] See also 142 Cong. Rec. H8178 (July 23, 1996) ("the purposes which we all endorsed [were] to meet the day-to-day legal problems of the poor") (Rep. Fox); H8180 ("[T]hey are supposed to be doing the ham and eggs work for poor people.") (Rep. Hunter).

[3] *See* S. Rep. No. 95-172 at 3 (1977) ("Most of the legal problems of eligible clients fall into four broad categories: family law; administrative benefits, including Medicaid, AFDC, and SSI; consumer law; and housing law.") This focus on the daily needs of the individual poor continued in the debates concerning the restrictions that were added in the 1996 and 1997 Acts. *See, e.g.*, 141 Cong. Rec. S18160 (Dec. 7, 1995) (emphasizing "such routine legal matters as consumer problems, housing issues, domestic and family cases, and . . . public benefits") (Sen. Sarbanes).

Third, to maintain this focus, Congress took a variety of steps to further its mandate that "[t]he legal services program must be kept free from the influence of or use by it of political pressures." 42 U.S.C. § 2996(5). For example, the LSC Act barred political activity by LSC or its grantees. 42 U.S.C. §§ 2996e(d)(3) (prohibiting campaign contributions by LSC grantees); 2996e(d)(4) (prohibiting activities "advocating or opposing any ballot measures, initiatives, or referendums"); and 2996f(5) (restrictions on lobbying). Other provisions were designed to keep LSC clear of politically controversial topics. For example, the statute barred LSC grantees from participating in litigation concerning school desegregation, abortion, and "draft dodgers." Id. §§ 2996f(b)(8)-(10). It also prohibited most criminal representation and strictly limited civil representation of prisoners, class actions, and fee-generating cases. Id. §§ 2996e(d)(5) and 2996f(b)(1)-(4). Most of these restrictions applied even if the activities were funded by private donors. Id. § 2996i(c) See also JA 297-298 (¶¶ 3-8).[4]

Congress believed that these restrictions on the activities LSC lawyers could engage in were necessary to achieve its goal of keeping LSC apolitical: "[P]art of the reason for [LSC's] success in avoiding the 'political thicket' and controversy has been some of the restrictions we placed in the original act of 1974." H.R. Rep. No. 95-310 at 31 (1977) (Rep. Butler). *See also Smith v. Ehrlich*, 430 F. Supp. 818 (D.D.C. 1976) (upholding prohibition on LSC lawyers running for political office). Additional restrictions promulgated by LSC were upheld as implementing the statutory mandate to avoid politically controversial issues. *Texas Rural Legal Aid v. Legal Services Corp.*, 940 F.2d 685 (D.C. Cir. 1991) (regulation barring redistricting activities). The history of

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[4] See also S. Rep. No. 95-172 at 7 (1977) ("[§ 2996i(c)] imposes the same prohibitions on funds received from private sources as those that are imposed on funds received from [LSC]"); 45 C.F.R. Parts 1610, 1627 (1995); 45 C.F.R. § 1610.1 (1976).

restrictions on the activities of LSC grantees is thus as old as the program itself.

B. The 1996 Compromise Concerning LSC

Over time, LSC came under attack from various quarters. App. 57a-58a.[5] The pressures increased in 1995 and 1996, as a result of budget constraints and the perception by some members of Congress that LSC was under the influence of "liberal activists who favor a militant agenda." 141 Cong. Rec. S14592 (Sept. 29, 1995). Some critics of LSC attempted to eliminate it entirely. Those efforts were rejected in favor of compromise legislation supported by Representative Rogers and Senator Domenici that was incorporated in the 1996 Omnibus Appropriations Act, Pub. L. No. 104-34, 110 Stat. 1321 (the "1996 Act").[6] That compromise reduced LSC's appropriation, provided for additional subject matter restrictions, and extended the restrictions to cover all funds of LSC grantees. Congress made clear that the purpose of the restrictions was to refocus LSC on its original mission and "to ensure that funding is used to provide the traditional legal services that are most needed by poor people." 141 Cong. Rec. S14605 (Sept. 29, 1995) (Sen. Stevens). See also S14590 ("[T]hese restrictions provide the necessary guidance to take Legal Services back to its primary mission." (Sen. Kassebaum)).

The Congressional debates make clear that the restrictions in the 1996 Act were an effort to save LSC and preserve its original focus and mission, not to eliminate the program. As Senator Domenici, one of the principal architects of the legislation, stated: "While some may not like these restrictions,

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[5] References to "App." are to the Appendix to Petitioners' petition.

[6] The restrictions at issue here were continued in subsequent legislation in 1997 (Pub. L. 104-208, 110 Stat. 3009) and 1998 (Pub. L. 105-119, 111 Stat. 2440). (the "1997 and 1998 Acts"). Accordingly, for ease of reference, we will hereinafter only refer to the 1996 Act. *See* App. 107a-145a.

they are necessary to . . . protect LSC from the negative perceptions of those who wish to see its termination." 142 Cong. Rec. S1963 (Mar. 13, 1996).[7]

C. The Restrictions At Issue

The restrictions in the 1996 Act that Petitioners sought to enjoin can be divided into three groups:

First, LSC may not provide funds to entities that litigate on behalf of certain aliens and incarcerated persons, or to entities that solicit clients in person to represent them for any purpose. 1996 Act §§ 504(a)(11), (15) and (18) ("representation restrictions").

Second, LSC may not provide funds to entities engaged in class action litigation or cases in which attorneys' fees are sought. Id. §§ 504(a)(7) and (13); 45 C.F.R. Parts 1617 and 1642 ("procedural restrictions").

Third, LSC cannot fund entities involved in efforts to influence executive orders and regulations, agency policies of general applicability and future effect, legislation, constitutional amendments, referenda, or initiatives. Id. §§ 504(a)(2)-(4) ("advocacy restrictions"). Grantee attorneys may, however, use non-LSC funds to participate in public rulemaking of any sort (including reform of a welfare system), to respond to written requests for information from agencies or legislative bodies, or to lobby for funding of the grantee organization itself. 45 C.F.R. 1612.6(a), (e) and (f).

The 1996 Act also provides that these restrictions apply to all of an LSC grantee's funds, and to any entity receiving a transfer of LSC funds. 1996 Act § 504(d); 61 Fed. Reg.

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[7] See also 141 Cong. Rec. S14607 (Sep. 29, 1995) ("[M]any of these restrictions are necessary to ensure that the program as a whole is supported and funded") (Sen. Lautenberg); S14612 ("[S]ome restrictions are necessary to ensure support for the program . . . . The [compromise] . . . would correct the harsh injustice of the committee bill and enable [LSC] to continue its important work") (Sen. Kennedy).

63749-54 (Dec. 2, 1996). Previously, the restrictions applied to a grantee's LSC funds, and in some cases, private funds as well, but not to a grantee's public funds.

Under the rules, if an attorney in an LSC-funded program determines that a strategy that they may not pursue is in the client's best interest, they can refer the client to an organization not covered by the limitations. App. 80a-81a and 102a. Individual full time employees are free to engage in the restricted "advocacy" activities in their individual capacity and on their own time. Finally, the regulations do not prohibit part-time employees of LSC grantees—including lawyers—from participating in the restricted activities as employees of non-LSC funded organizations that are financially and physically separate from the grantee. JA 294-295.

D. LSC's Program-Integrity Regulations

Shortly after the passage of the 1996 Act, LSC began drafting implementing rules and solicited comments on several interim rules. At that time, LSC's policy did not allow any entity under the effective control of an LSC grantee to engage in prohibited activities. Whether an entity was "effectively controlled" by a grantee was determined based on an "interrelated organizations" test which considered the presence of interlocking directors, shared funding, and other similar factors. JA 324 (¶¶ 14-15) and 360-362.

LSC grantees were required to disengage themselves from most pending restricted matters and to close or otherwise transfer pending class actions and matters involving prisoners and aliens by August 1, 1996. Between enactment of the 1996 Act and August 1, 1996, many cases were settled or otherwise terminated. Where cases were not terminated, recipients were required to either locate and arrange for the referral of the matter to another appropriate service provider, or to transfer the case to substitute counsel. Recipients were obligated to close or transfer open matters consistent with

their professional responsibilities to their clients. JA 320-321 (¶¶ 3-5).

E. The District Court Litigation

On January 27, 1997, Petitioners moved to preliminarily enjoin the restrictions described above on the grounds that, inter alia, they violated the First Amendment. Several weeks earlier, a similar action had been brought in the United States District Court for the District of Hawaii. Before briefing in the instant action was completed, that court granted in part and denied in part the request for a preliminary injunction in the action before it. *Legal Aid Society of Hawaii v. Legal Services Corporation*, 961 F. Supp. 1402 (D. Haw. 1997) ("*LASH I*"). The court found that the plaintiffs had a fair likelihood of showing that LSC regulations then in effect, as they related to most of the restricted activities, violated the unconstitutional conditions doctrine because LSC's "interrelated organizations" rule failed to provide the adequate alternative channels of expression required by this Court in its decisions in *TWR*, *League of Women Voters* and *Rust*. The court also concluded that restrictions on class actions, claims for attorneys' fees, and representation of ineligible aliens did not implicate any constitutional rights, and denied the motion as to those restrictions. *LASH I*, 961 F. Supp. at 1410-1411.

In response, LSC reviewed and modified its implementing rules to address the concerns raised in *LASH I*. Interim rules were published in the Federal Register on March 14, 1997. These rules, which were in effect when the district court heard argument on Petitioners' motion, eliminated the regulations restricting transfers of non-LSC funds and created an alternative avenue for expression through "interrelated organizations" that were "physically and financially" separate from LSC recipients. JA 322-324 and 356-359. The physical and financial separation requirements were modeled after the regulations upheld in *Rust*. JA 495 and 507. However, as the district court observed, there were still differences between the LSC regulations and those at issue in *Rust*. App. 74a-75a.

After receiving comments on the new interim rule, on May 21, 1997 LSC revised and issued the "program integrity" regulations at issue here. 45 C.F.R. Part 1610. (App. 146a-172a). These regulations completely eliminated the "interrelated organizations" test and removed minor variations in wording between the LSC (interim) rule and the regulations approved by this Court in *Rust*.

On December 22, 1997, the district court denied the motion for a preliminary injunction. App. 53a-103a. It concluded that the regulations constituted a permissible attempt by LSC to guard against the appearance that Congress was supporting the prohibited activities, and rejected Petitioners' contention that they were void-for-vagueness or overbroad. Relying on *Rust*, the court also found that the restrictions did not significantly impinge upon any First Amendment rights. It also rejected Petitioners' claim that doctors and lawyers in federally subsidized programs are somehow different.

In concluding that the program integrity regulations were constitutional under *Rust*, the district court reached the same conclusion as the federal court in Hawaii, which, after considering the impact of the final rules on its initial ruling, dissolved its earlier injunction and granted LSC summary judgment. *Legal Aid Society of Hawaii v. Legal Services Corporation*, 981 F. Supp. 1288 (D. Haw. 1997) ("*LASH II*"). That decision was affirmed by the Court of Appeals for the Ninth Circuit in *LASH III*.

F. The Court of Appeals' Decision

On appeal, the court of appeals unanimously affirmed the lower court's ruling in all but one respect.[8] Relying on this

[8] By a two-to-one vote, the panel held that a provision in section 504(a)(16) of the 1996 Act prohibiting an LSC-funded lawyer from representing a client if the representation involves a challenge to the welfare reform law as it exists at the time the representation is undertaken was

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Court's decisions in *TWR*, *League of Women Voters*, and *Rust*, the court held that the 1996 Act did not impermissibly condition the receipt of a government benefit on the relinquishment of First Amendment rights because LSC's program-integrity rules provided adequate alternative channels for the exercise of those rights. The court also rejected the claim that the relationship between LSC-funded lawyers and their clients was entitled to more protection than the doctor-patient relationship in *Rust*:

> [T]he lawyer-client relationships funded by LSC are no more "all-encompassing" than the doctor-patient relationships funded under Title X, which were considered in *Rust*. . . . .
>
> * * * *
>
> Just as Congress is entitled to provide a limited range of medical services under Title X, it is free to offer a limited menu of legal services under the LSCA.

App. 17a.

Petitioners had also argued that the requirements of the program integrity regulations were "immensely wasteful" and so substantial so as to interfere with the (alleged) First Amendment rights at issue. The court rejected this argument, noting that there was no evidence in the record that the restrictions—which, the court observed, were identical to those at issue in *Rust*—had the impact alleged by Petitioners, and that Petitioners had failed to establish, as they were required to do in mounting a facial challenge to the statute, "that no set of circumstances exists under which the Act would be valid." App. 22a-24a.

Finally, the court rejected Petitioners' argument that the program integrity regulations were an unreasonable inter-

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unconstitutional. That aspect of the panel's decision is the subject of LSC's petition for a writ of certiorari (Docket No. 99-603) and is not addressed here.

pretation of the 1996 Act and not entitled to full deference under this Court's ruling in *Chevron USA Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Following the only case that had previously addressed the issue (*Texas Rural Legal Aid v. Legal Services Corp.*, 940 F.2d 865 (D.C. Cir. 1991)), the court held that LSC's regulations were entitled to full *Chevron* deference and that applying this standard, the regulations were a "permissible construction" of the LSC Act. App. 10a-13a.

REASONS FOR DENYING THE WRIT

That part of the unanimous decision of the court of appeals upholding the 1996 Act against the facial First Amendment challenge is correct. It is consistent with this Court's rulings in *Rust*, *TWR*, *League of Women Voters*, *Rosenberger v. Rector and Visitors the University of Virginia*, 515 U.S. 819 (1995) and *National Endowment for the Arts v. Finley*, 118 S. Ct. 2168 (1998). It is also is in accord with the Ninth Circuit's decision in *Lash III*. Petitioners seek to create a sense that this case is complicated and unique by misconstruing dictum in *Rust* and by attempting to shoehorn a federally funded program to provide a narrowly defined set of legal services to the indigent into this Court's public forum jurisprudence. As we demonstrate below, every federal court that has considered these arguments has rejected them. There is no reason for this Court to grant the petition.

A. The Court of Appeals Correctly Rejected The Argument That The LSC Program Creates A Traditional Lawyer-Client Relationship

Relying on cases involving the associational rights of privately established lawyer-client relationships,[9] Petitioners

[9] Petitioners rely, *inter alia*, on *NAACP v. Button*, 371 U.S. 415 (1963), *In re Primus*, 436 U.S.1996, and *United Mine Workers of Amer-*

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argue that the associational rights of LSC-funded lawyers are being impermissibly burdened. This argument is fundamentally flawed because it ignores the basic fact that, as the Second Circuit correctly concluded, a traditional, all-encompassing lawyer-client relationship does not exist here.

As the Second Circuit noted, Petitioners' argument is based on dictum in *Rust* suggesting that "[i]t could be argued . . . that traditional relationships such as between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government." *Rust*, 500 U.S. at 200. Based on this suggestion, Petitioners argue that *Rust* conferred the full scope of First Amendment protection to "traditional" service provider-client relationships, and that such a relationship exists here. However, as the Second Circuit observed, the Court in *Rust* concluded that it *did not* have to address this hypothetical because "the doctor-patient relationship established by the Title X program [was not] sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice." *Id.*

The Second Circuit correctly held that, as in *Rust*, the lawyer- client relationship established by the LSC program was also not the "traditional" and "all-encompassing" relationship that *might* qualify for constitutional protection:

> Even if we assume that an "all-encompassing" lawyer-client relationship enjoys heightened protection from government regulation, the lawyer-client relationships funded by LSC are no more "all-encompassing' than the doctor-patient relationships funded under Title X, which were considered in *Rust*. *[T]he LSCA has always limited the range of legal services available*. . . Because grantee lawyers are bound to explain to prospective and actual clients the limitations imposed by the 1996

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ica v. Illinois State Bar, 389 U.S. 217 (1967), all of which involved private organizations and lawyers working for or affiliated with them.

> restrictions, and may refer clients to lawyers unencumbered by the restrictions, there is no reason to fear that clients will detrimentally rely on their LSC lawyers for a full range of full legal services. The LSC lawyer-client relationship cannot, therefore, be considered "sufficiently all-encompassing so as to justify an expectation on the part of the [client] of comprehensive [legal] advice." *Rust*, 500 U.S. at 200. *Accordingly, we need not decide whether the traditional lawyer-client relationship enjoys constitutional protection because (as in Rust) such a relationship does not exist for practitioners and clients operating under the challenged statutory scheme.*

App. 16a-17a (emphasis added). Thus, as in *Rust*, the question of whether or not a traditional lawyer-client (or doctor-patient) relationship is entitled to First Amendment protection is not before this Court.

Petitioners, relying on *Rosenberger*, also argue that lawyers should be viewed somewhat akin to teachers or other speakers in universities that receive government funding. Once again, Petitioners misconstrue the nature of the LSC program.

In *Rosenberger*, this Court held that when the government spends money to create a public forum dedicated to promoting the free exchange of ideas—like a university newspaper—it may not selectively subsidize points of view. The LSC program is *not* a public forum, and it is dedicated to the provision of a specifically defined set of services to the indigent, *not* to the free exchange of ideas.

The irrelevance of *Rosenberger* and public forum jurisprudence was recognized by Justice White (part of the *Rust* majority), sitting by designation in *LASH III*:

> Appellants rely on *Rosenberger* to support their claim that the LSC is a program designed to encourage private speech . . . This analogy to *Rosenberger* is not persuasive. The government in *Rosenberger* "expend[ed] funds to encourage a diversity of views from private speakers,"

> unlike the LSC program where the "government [has] appropriate[d] public funds to promote a particular policy of its own." Like the Title X program in *Rust*, the LSC program is designed to provide professional services of limited scope to indigent persons, not to create a forum for the free expression of ideas.

LASH III, 145 F.3d at 1028 (citations omitted).

In *Finley*, this Court reconfirmed that the distinguishing feature of *Rosenberger* was the use of government funds to create a limited public forum. *Finley*, 118 S. Ct. at 2178 ("We held [in *Rosenberger*] that . . . the University had created a limited public forum from which it impermissibly excluded all publications with religious editorial viewpoints.) *See also id.*, at 2184 ("*Rosenberger* . . . found the viewpoint discrimination unconstitutional, not because 'private' speech was involved, but because the government had established a limited public forum. . .") (Scalia, J., concurring).

Because the LSC program is not a limited public forum for the free exchange of ideas, *Rosenberger* has no bearing on this case. The restrictions in the LSC Act are constitutional.

B. The Restrictions In The 1996 Act Do Not Constitute Viewpoint Discrimination

Petitioners raise the claim that the restrictions in the 1996 Act constitute impermissible viewpoint based discrimination. This argument was also correctly rejected.

First, as the court of appeals observed, the restrictions at issue focus on subject-matter, not viewpoint. App. 24a-29a. Thus, for example, the 1996 Act restricts LSC grantees from "attempting to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress of a State or local legislative body." 1996 Act at § 504(a)(4). The court correctly concluded that because this restriction applies to attempts to

influence the passage *or* defeat of legislation, it "burdens no particular viewpoint and favors neither speech in support of legislative action nor speech opposed." App. 25a.

Moreover, Petitioners ignore *Rust*. *Rust* involved a challenge to a section of the Public Health Services Act prohibiting the use of funds appropriated for family-planning services in programs where abortion was a method of family planning and the regulations promulgated thereunder. The *Rust* limitations imposed a "gag rule" on doctors. Doctors in the Title X program could thus not talk to their pregnant clients about abortion, either to advise them that abortion was an alternative they could consider or to refer them to doctors who were not part of the Title X program and therefore free to discuss this option with them. 42 C.F.R. §§ 59.8(a)(1)-(2) and (5). The limitations in *Rust* prevented doctors from (a) giving their patients complete advice with respect to their health care options, (b) informing their patients of an option that was a constitutional right, and (c) even disclosing the fact that the rules required the doctors to provide one-sided advice.

The *Rust* gag-rule was challenged as a violation of the free speech clause of the First Amendment. This district court and Second Circuit both rejected this argument. Before this Court, petitioners argued for a third time that the statute and regulations "impermissibly impos[ed] 'viewpoint-discriminatory conditions on government subsidies.' " *Rust*, 500 U.S. at 192 (quoting petitioners' Brief). And for a third time, the argument—the precise one being advanced in this case—was rejected:

> There is no question that the statutory prohibition [on abortion-related activity in the context of the Title X program] is constitutional. . . . The Government can, without violating the Constitution, *selectively fund* a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem

> in another way. *In doing so, the Government has not discriminated on the basis of viewpoint; it has merely chose to fund one activity to the exclusion of another. . .*

Rust, 500 U.S. at 192-193 (emphasis added) (citations omitted).

Rust makes clear that the government's decision to selectively subsidize activities within a program it creates is *not* unlawful viewpoint discrimination. In *Rust*, Congress subsidized certain family planning speech but refused to subsidized family planning speech relating to abortion. Here, Congress will pay for certain legal services for the indigent but not for others. And, more recently, in *Finley* this Court reiterated that under *Rust*, subsidization of speech in government programs is not governed by the same rules as direct regulation of speech and does not constitute unlawful viewpoint discrimination. *See also TWR*, 461 U.S. at 549 ("[A] legislature's decision not to subsidize the exercise of a fundamental right does not infringe that right") and *Harris v. McRae*, 448 U.S. 297, 317, n.19 (1980) ("A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity.")

Moreover, the restrictions here, even if they were to be considered viewpoint-based (which as the Second Circuit held, they are not), they are far less viewpoint-skewed than the rule approved in *Rust*. Unlike doctors in *Rust*, there is no gag-rule on LSC-funded lawyers. They can advise persons seeking legal advice that the services these persons need are outside the scope of the LSC program. They can also refer these persons to lawyers who can provide the services in question. The rules this Court approved in *Rust*, on the other hand, prevented women from getting similar information about their constitutional right to an abortion, and left them less informed (or even misinformed) about their rights than prospective clients here. Under *Rust*, the restrictions in the 1996 Act are constitutional.

C. The Court of Appeals Correctly Rejected The Argument That The Program Integrity Rules Impermissibly Burden The Exercise Of Constitutional Rights

Even assuming any constitutional rights were implicated, Petitioners' facial challenge to the 1996 Act was nevertheless properly rejected. As the court of appeals observed, this Court's trilogy of decisions in *TWR, League of Women Voters* and *Rust* makes clear that "in appropriate circumstances, Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression." App. 20a. As the court of appeals correctly concluded, the program integrity regulations promulgated by LSC provide such adequate alternative channels.

Petitioners seek to avoid the holdings of these cases by arguing that the program-integrity regulations are "wasteful" and expensive. Given the procedural context of this case—Petitioners brought a facial challenge to the 1996 Act—there is no record whatsoever to support Petitioners' contention. As the court of appeals correctly concluded in rejecting this argument:

> We find that plaintiffs' allegations are insufficient to sustain a facial challenge. We are unable to assess these contentions [of undue burden] on the sparse record before us, and we need not assess them to decide this appeal. . . . [P]laintiffs present little evidence to support their predictions regarding how seriously the 1996 Act will affect grantees generally, and they provide no basis for concluding that the program integrity rules cannot be applied in at least some cases without unduly interfering with grantees' First Amendment freedoms. It appears likely that LSC grantees with substantial nonfederal funding can provide the full range of restricted activity through separately incorporated affiliates without serious difficulty. Plaintiffs have therefore failed to

"establish that no set of circumstances exists under which the Act would be valid," and so their facial challenge must be rejected.

App. 23a-24a (citing *Rust*) (emphasis added).[10]

In short, in light of the facial nature of Petitioners' challenge, the court of appeals correctly rejected their wholly unsubstantiated attack on the alleged burdensome nature of the alternative channels of expression provided by the LSC program integrity regulations.[11]

D. The Court of Appeals Correctly Held That LSC's Regulations Are Entitled To Chevron Deference

Finally, the court of appeals correctly held that LSC is entitled to the full measure of deference under this Court's ruling

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[10] Indeed, even if the program-integrity rules imposed some financial burden on the full exercise of any constitutional rights that might be at stake, they would still be valid. *See TWR*, 461 U.S. at 550 ("Although TWR does not have as much money as it wants, and thus cannot exercise its freedom of speech as much as it would like, the Constitution 'does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.' ") (*quoting Harris*, 448 U.S. at 318 (holding that economic impossibility of obtaining an abortion does not obligate government to fund the right or forego imposing threshold medical requirements to ensure that funds are spent for approved purposes).

[11] Petitioners also take issue with the district court's conclusion that Congress has a legitimate interest in avoiding the public perception that LSC funds are being used to support activities that Congress has chosen not to fund and that the separation requirements imposed by LSC are required to protect this interest, particularly given that the activities of LSC grantees assume numerous forms and take place in multiple settings. App. 95a-96a. The cases that Petitioners cite for the proposition that this "endorsement" rationale is insufficient to justify the restrictions are inapposite because they do not deal with government financial subsidies and do not deal with activities taking place in multiple settings. *See, e.g., Turner Broadcasting Co. v. Federal Communications Comm'n*, 512 U.S. 622 (1994) (private party's concern about not appearing to endorse particular point-of-view that was expressed in *one* setting could be addressed through disclaimer).

in *Chevron USA Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984) and rejected Petitioners' statutory attack on the validity of the program-integrity regulations.

The court's holding was consistent with the only other appellate court to have addressed this issue. Thus, in *Texas Rural Legal Aid*, 940 F.2d at 690, the court of appeals for the District of Columbia held that LSC is entitled to "the full measure of interpretive authority under [LSC] Act contemplated by *Chevron*." Indeed, Petitioners offer no authority whatsoever to support their claim for a different, more exacting standard, to apply.[12] There is no basis to review the court's ruling on this point.[13]

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[12] The cases Petitioners cite (*Regional Management Corp. v. Legal Services Corp.*, 186 F.3d 457, 1999 WL 547925 (4th Cir., July 28, 1999) and *Spokane County Legal Services v. Legal Services Corp.*, 614 F.2d 662 (9th Cir. 1980)) do not address this issue. Rather, they simply held that LSC is not subject to the Administrative Procedure Act ("APA"). That this finding is not inconsistent with according LSC rulemaking *Chevron* deference is evident from the fact that in *Texas Rural Legal Aid*, the D.C. Circuit held *both* that LSC was not subject to the APA *and* that LSC was entitled to *Chevron* deference.

[13] Petitioners also claim that this is "may be this Court's only opportunity" to review the issues raised in herein because the 1998 legislation includes a provision that debars an LSC recipient who sues LSC. Petition at 29-30. In fact, while the statute provides that LSC "may" invoke this sanction (App. 142a), LSC, pursuant to rulemaking authority contained in the statute (*id.*) issued rules providing that the debarment provision shall not apply to constitutional challenges to LSC actions. 61 Fed. Reg. 64636 at 64640 and 64643-44 (Nov. 23, 1998) (to be codified at 45 C.F.R. § 1606.4(b)(5)(iii)).

CONCLUSION

The issues raised in this petition are not novel. They do not present any conflict with prior rulings of this Court. They do not present any conflict with the decisions of other circuit courts of appeal. In short, there is no reason for this Court to grant the petition. The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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